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No. 98-88

In the Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD E. FLESHMAN, PETITIONER

v.

TOGO WEST, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly interpreted 38 U.S.C. 5101(a) in holding that petitioner's unsigned application for veterans disability benefits was not in the form prescribed by the Secretary, and therefore could not provide the basis for the effective date of his receipt of disability benefits.

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OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. 1a-11a) is reported at 138 F.3d 1429. The opinion of the United States Court of Veteran Appeals (Pet. App. 12a-22a) is reported at 9 Vet. App. 548. The opinion of the Board of Veterans' Appeals (Pet. App. 23a-33a) is unreported.

JURISDICTION

The judgment of the Federal Circuit was entered on March 11, 1998. On May 20, 1998, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 9, 1998. A petition for a writ of certiorari was filed on July 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner served in the United States Army from October 1984 to October 1987. Pet. App. 13a. On May 24, 1986, he fell from a repelling tower, sustaining injuries to his back and right leg. *Id.* at 2a. Petitioner subsequently returned to duty. *Ibid.* After completing the remaining eighteen months of his enlistment, he was honorably discharged in October 1987. *Ibid.* The same month, petitioner submitted, on a two-page form entitled "Veteran's Application for Compensation or Pension at Separation from Service," a claim for compensation to the Department of Veterans Affairs Regional Office (VA) in Cleveland. *Ibid.*

Although petitioner completed the first page of the form, he did not fill out the second page. Pet. App. 2a. Petitioner "therefore failed to complete the portion of the form calling for (1) his signature, certifying that the statements in the form were accurate and complete, and consenting to have any treating physicians furnish information to the Department of Veterans Affairs; (2) his mailing address; and (3) the date of execution of the form." *Ibid.*

The VA sent petitioner a letter requesting further information. Pet. App. 2a. Enclosed with the letter was petitioner's incomplete claim form, with check marks next to the boxes in which the missing information should have been included. *Ibid.* The letter asked petitioner to provide the information missing from the form and to return the completed form as soon as possible, and in any event within one year. *Ibid.* The letter specifically stated that, if the completed form was not returned to the VA within one year from the date of the letter, "benefits, if entitlement is established, may

not be paid prior to the date of [the form's] receipt." *Id.* at 2a-3a. Petitioner never returned the form. *Id.* at 3a.

In January 1992, petitioner submitted a new claim for compensation. Pet. App. 3a. The 1992 application, unlike the 1987 application, was signed, dated and bore a return address. *Ibid.* The VA Regional Office granted petitioner's claim effective January 30, 1992, "the day on which it received his application." *Ibid.*

2. Petitioner filed a Notice of Disagreement in July 1992, arguing that the effective date for his receipt of benefits should be the date that he submitted the unsigned application form in 1987. The Board of Veterans' Appeals (BVA) rejected that argument. The BVA concluded that the effective date was January 30, 1992, the date petitioner finally submitted a completed application. Pet. App. 30a-32a.

The BVA explained that, even though the VA "informed [petitioner] that his claim would be deemed extinguished and further processing would cease" if he did not return the completed form within one year, petitioner "never returned the form, and no further processing was accomplished in regard to his abandoned claim." Pet. App. 30a. Thus, because the completed claim was not received until more than one year after petitioner was separated from service, the date of that claim's receipt was the effective date of petitioner's claim under 38 U.S.C. 5110. Pet. App. 31a-32a.

The BVA also rejected petitioner's assertion that the VA did not meet its statutory duty to assist him by not processing the incomplete claim form. The "duty to assist," stated the BVA, "is not a one way street"; it does not entitle a veteran to "wait passively" for help from the VA. Pet. App. 32a. Because petitioner's "failure to return a completed claim form despite the [Regional Office]'s request constituted abandonment of that

claim," it "did not give rise to any further duty to assist" petitioner on the part of the VA. *Ibid.*

3. Petitioner timely appealed the decision of the BVA to the Court of Veteran Appeals (CVA). That court also rejected petitioner's claim that the effective date should be the date on which he submitted the unsigned application. The CVA noted that 38 U.S.C. 5101(a) requires a specific claim to be "in the form prescribed by the Secretary." Pet. App. 17a. Absent a signature and the other requested information, the court found, the 1987 claim form was simply an informal claim for benefits. *Id.* at 17a-19a. The CVA further found that under 38 C.F.R. 3.155(a) (1995), the VA acted properly by sending petitioner the incomplete form for execution, Pet. App. 18a, and that the "unexecuted claim form * * * would not have been in the form prescribed by the Secretary until [petitioner] returned it with the requested information." *Ibid.*

4. Petitioner then appealed to the United States Court of Appeals for the Federal Circuit, which affirmed the decision of the CVA. The Federal Circuit interpreted the phrase "in the form prescribed by the Secretary" in Section 5101(a) as requiring an applicant "to submit a claim in a particular format, containing specified information, and signed by the claimant, as called for by the blocks on the application form." Pet. App. 5a. It found that petitioner did not provide "critical elements of the information requested on the form" in 1987, *ibid.*, even though the VA returned the form to him in order to obtain that information. *Id.* at 7a-8a. Thus, the court ruled, the effective date for petitioner's receipt of benefits could not be based on his incomplete 1987 application. *Ibid.*

ARGUMENT

Neither of the questions raised by the petition was presented to or discussed by the court of appeals. Moreover, the decision of the Federal Circuit that petitioner's 1987 application was not "in the form prescribed by the Secretary" under 38 U.S.C. 5101 and therefore could not provide a basis for an earlier effective date for his disability benefits is correct and does not conflict with any decision of this Court. Accordingly, further review of this case is not warranted.

1. Question one in the petition is based upon a purported conflict between the *Chevron* doctrine, see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the canon of statutory construction that veterans' statutes "are to be construed in the beneficiaries' favor," see *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991); *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Petitioner contends that the Federal Circuit erred when, following *Chevron*, it resolved this alleged conflict in the Secretary's favor. This contention has no merit.

a. The issue of a possible conflict between *Chevron* and the canon of statutory construction referred to in *King* and *Gardner* is not presented by this case. The Federal Circuit neither addressed nor decided such an issue in its opinion. Indeed, nowhere in its decision did the court even refer to *Chevron* or in any way defer to the VA's interpretation of Section 5101(a), let alone "rule" (Pet. i) that the interpretation was entitled to *Chevron* deference. This is because the court interpreted the clear and unambiguous language of the statute *de novo* and thus had no occasion to resort to the VA's interpretation for guidance. For this reason alone the petition should be denied. See, *e.g.*, *Taylor* v.

Freeland & Kronz, 503 U.S. 638, 646 (1992); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. Moreover, the Federal Circuit was correct in deciding the case without adverting either to *Chevron* deference or to the *King-Gardner* canon of statutory construction, because neither principle applies when, as here, Congress has made its intent clear through the plain language of the statute. Thus this Court stated in *Chevron*: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843. See also *Jones* v. *West*, 136 F.3d 1296, 1299 n.2 (Fed. Cir. 1998) ("[G]iven the plain meaning of the statutory provisions at issue, it is irrelevant for purposes of this appeal whether deference is warranted under *Chevron* * * *. For similar reasons, the mandate of *Brown* v. *Gardner* * * *, that 'interpretive doubt is to be resolved in the veterans' favor,' has no bearing on the resolution of this case.") (citations omitted), petition for cert. pending, No. 97-9025.

Similarly, although *King* contains reference to the canon of statutory construction relating to veterans' statutes, the Court there ultimately based its decision on the "plain" meaning of 38 U.S.C. 2024(d). 502 U.S. at 221. And *Gardner* itself explains that, unless an ambiguity exists in construing a statute, the canon supporting construction of the statute in favor of the veteran beneficiaries does not apply. 513 U.S. at 118; see also *Smith* v. *Brown*, 35 F.3d 1516, 1525 (Fed. Cir. 1994) ("[A] canon of broad construction comes into play only if the meaning of the text is doubtful. Otherwise there is no room for such construction, and the court must

give effect to the clearly expressed intent of the legislative authority.").

Petitioner has not demonstrated that Section 5101(a) is ambiguous, or that the Federal Circuit (and the CVA) incorrectly construed the plain meaning of the statute. Section 5101(a) provides: "A specific claim *in the form prescribed by the Secretary* * * * must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary" (emphasis added). Clearly, by its terms, the statute requires an application "*in* the form," not *on* the form or *using* the form, prescribed by the Secretary. Put another way, the term "in the form prescribed" refers not to the submission of a particular piece of paper, but rather to a claim in a particular format, containing specified information, and signed by the claimant, as called for by the blocks of the application. It is not enough, as petitioner asserts, to file a copy of the form provided by the VA without completing all of the pertinent sections. Instead, as the Federal Circuit concluded, petitioner was required to submit his claim "in a particular format, containing specified information," and with his signature, as suggested by the application form. Pet. App. 5a. That conclusion was correct; no reason exists to review it further.

2. Question 2 in the petition was likewise not presented to the court below, and likewise does not merit further review. Petitioner claims that the Federal Circuit erred when it concluded that his unsigned application was not an application within the meaning of Section 5110 for the purpose of establishing the effective date of petitioner's disability benefits. Petitioner contends that Section 5101, requiring applications "in the form prescribed by the Secretary," does not apply to his application, because within Section

5110, entitled "Effective dates of awards," Section 5101 is specifically mentioned in Section 5110(g), which does not apply to his case, and not in Section 5110(b), which does.

a. Petitioner never raised this argument below and, consequently, the court of appeals never addressed it. Thus petitioner is now barred from raising it before this Court under the long-standing principle that arguments not raised below by the appellant will not be considered by the reviewing Court for the first time upon appeal. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Ramsey* v. *United Mine Workers*, 401 U.S. 302, 312 (1971); *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *Wallace* v. *Department of the Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989).

b. Petitioner's argument is, at any rate, incorrect. Section 5110(g) "deals with the effective dates of awards, and, with regard to compensation and pension claims, sets the effective date for awards or increases made 'pursuant to any Act or administrative issue.'" *Routen* v. *West*, 142 F.3d 1434, 1441 (Fed. Cir. 1998), petition for cert pending, No. 98-147. The purpose of the statute is to provide for the situation of veterans who have claims pending when the substantive law changes in a manner that would benefit them; Section 5110(g) obviates the need for such veterans to file *another* claim *after* the change. See *McCay* v. *Brown*, 106 F.3d 1577, 1580 (Fed. Cir. 1997). Even so, the submission of an application in the form prescribed by the Secretary is still a prerequisite for entitlement to any award under that section, as it is under any part of Section 5110. This is because Section 5110 merely establishes rules for the determination of effective dates where the statutory prerequisites for entitlement

have been satisfied. Inclusion of a specific reference to section 5101 in Section 5110(g) serves to make clear that, although Section 5110(g) contemplates that the VA may act on its own to identify claimants who may be entitled to benefits as a result of a change in law, see *McCay*, 106 F.3d at 1580, an application remains a prerequisite for entitlement. The reference has no bearing on the meaning of "application" in Section 5110(b). That word means the same thing in both Section 5110(b) and 5110(g).

At bottom, petitioner's argument is simply an unsuccessful attempt to avoid the plain meaning of Section 5101, which requires the application to be in the form prescribed by the Secretary before an effective date for benefits can be established. Indeed, when what is sought here—the veteran's signature—is completely within his control to provide, the agency can do no more than send the form to the veteran and, giving him ample time, ask him to complete it. See, *e.g.*, *Edenfield* v. *Brown*, 8 Vet. App. 384, 389 (1995). *McTighe* v. *Brown*, cited by petitioner, is not to the contrary. In *McTighe*, the claimant did not file an application for benefits for several years because of incorrect advice given to her by a veterans benefits counselor. 7 Vet. App. 29, 30 (1994). The court held that even if her failure to file a claim "in the form prescribed by the Secretary" resulted from the erroneous advice, she still was not entitled to benefits from an earlier effective date. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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